

Balance ACT

SECTION BY SECTION ANALYSIS OF

REP. LOFGREN'S BALANCE ACT

SECTION 1:

Designates

the title as the "Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act."

SECTION 2:

Sets forth factual findings with respect to the traditional balance of copyright law. That balance has been altered by the development of digital technology, the rise of the Internet, and federal laws enacted to cope with the new technologies. On the one hand, digital technology threatens the rights of copyright holders. Perfect digital copies of songs and movies can be publicly transmitted, without authorization, to thousands of people at little or no cost. On the other hand, technological control measures give copyright holders the capacity to limit nonpublic performances and threaten society's interests in the First Amendment and fair use rights.

The DMCA

was enacted as an attempt to safeguard the traditional balance in the face of these new challenges. But in practice, it has endangered the rights and expectations of purchasers. Contrary to the intent of Congress, section 1201 of the DMCA has been used to prohibit purchasers from circumventing technical restrictions for any reason, even to pursue their fair use rights.

The

authors of the DMCA never intended to create such a dramatic shift in the balance. As the House Judiciary Report accompanying the DMCA stated: "[A]n individual [should] not be able to circumvent in order to gain unauthorized access to a work, but should be able to do so in order to make fair use of a work which he or she has acquired lawfully." House Report 105-551, Part I, Section-by-Section Analysis of section 1201(a)(1).

It is time to restore the balance

and give consumers a legitimate alternative to piracy that is affordable, reliable, secure and respectful of their reasonable rights and expectations.

SECTION 3:

(a)

Section (a) clarifies that America's historic principles of fair use - codified in section 107 of Title 17 - apply to analog and digital transmissions.

(b) The digital age has dramatically increased the power of copyright holders to control the way consumers use digital content. For example, online publishers don't just set the price of digital books. They can control where consumers read books, and for how long. They can even prevent a consumer from sharing their copy with a friend or family member.

This control over consumer uses has altered the traditional balance of copyright law. Section (b) seeks to restore the balance by adding section 123 to Title 17. Section 123 gives purchasers the ability to make backup copies of digital works, and to use digital works on preferred digital media devices. It further protects consumers by prohibiting non-negotiable "click-wrap" licenses that limit their legal rights and expectations.

Consumers have shown that they want to use content on new and exciting platforms. As long as they operate within the boundaries of the law, they should not have to ask copyright holders for permission to do so.

Ultimately, this proposal will help content owners. The bill does not let consumers take their digital content and share it with a million of their best friends. It simply seeks to encourage a legitimate alternative to piracy that respects consumer rights and expectations, which is the only lasting cure for digital piracy.

SECTION 4:

Today, when a consumer purchases a book, they are free to lend their

copy to a friend, or to sell their copy to a used books store. Section 4 allows consumers to do the same thing with digital content by extending the first sale doctrine - codified in section 109 of Title 17 - to digital transmissions. At the same time, it protects copyright holders by restricting such transmissions to a single recipient and requiring consumers to transmit their copies with copy-control restrictions in place. Consumers also have to get rid of their copy after they transmit the work to someone else.

SECTION 5:

Contrary to the intent of Congress, Section 1201 of the DMCA has been used to prohibit all users - including those who have purchased products - from circumventing technical restrictions for any reason. As a result, lawful consumers cannot legally circumvent technological restrictions, even if they are simply trying to exercise a fair use or to utilize a work on the device of their choice.

Section

5 reaffirms the original intent of the 105th Congress, while also providing needed flexibility for copyright owners. Under section 5, a copyright owner is free to employ technical measures to protect his or her work. However, the copyright owner must ensure that those measures allow purchasers to make non-infringing uses of the work.

There

is no single fix prescribed. For instance, the copyright owner might provide a special password to purchasers, or may develop new and innovative ways to enable non-infringing uses. Only if a copyright owner fails to make a solution publicly available, can a consumer circumvent technological protections.

Since most

consumers do not have the expertise needed to circumvent encryptions, Section 5 permits tools that are designed, produced and marketed for that purpose. Again, these tools are only permissible if the copyright owner fails to give consumers a choice by restricting legitimate uses without providing any solution for the purchaser.

REP. LOFGREN'S BALANCE ACT

For over one hundred years, copyright law has aspired to strike between the interests of copyright holders in the control and exploitation of their works with the interests of society in the free

a fair balance

flow of ideas, information and commerce. The great challenge today is to maintain that balance in the digital age by finding ways to prevent and punish digital pirates without treating every consumer as one. The Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act achieves this, and does so without utilizing government mandates or other prescriptive measures that ultimately only serve to stifle innovation.

Specifically, the BALANCE Act:

- o Clarifies that America's historic principles of fair use - protected under Section 107 of the Copyright Act - apply to analog and digital transmissions.

- o Allows purchasers to make backup copies and display digital works on the devices of their choice.

- o Protects purchasers by prohibiting non-negotiable shrink-wrap licenses that limit their rights and expectations.

- o Clarifies that purchasers can sell or give away their copies of digital works, just like they can with traditional hard media.

- o Protects purchasers by permitting them to bypass technical measures that impede their rights and expectations.

- o Provides flexibility for content owners to develop new and innovative ways to protect their content and enable lawful uses.

The BALANCE Act has wide support among leading academics, including Professor Larry Lessig of Stanford Law School and Professor Pamela Samuelson of Boalt Hall, consumer electronics, computing, communications and Internet commerce companies, consumer groups, and libraries.